

# **An Overview of The Companies Bill, 2011**

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## **1.0 Meaning of Company**

The word 'Company' is an amalgamation of the Latin word 'Com' meaning "with or together" and 'Pains' meaning "bread". Originally, it referred to a group of persons who took their meals together. A company is nothing but a group of persons who have come together or who have contributed money for some common person and who have incorporated themselves into a distinct legal entity in the form of a company for that purpose.

Generally, a company is a form of business organization. The precise definition varies from country to country.

Companies, whether public or private, are an indispensable part of an economy. They are the modes through which a country grows and expands world wide. Their performance is an important parameter of a countries economic position.

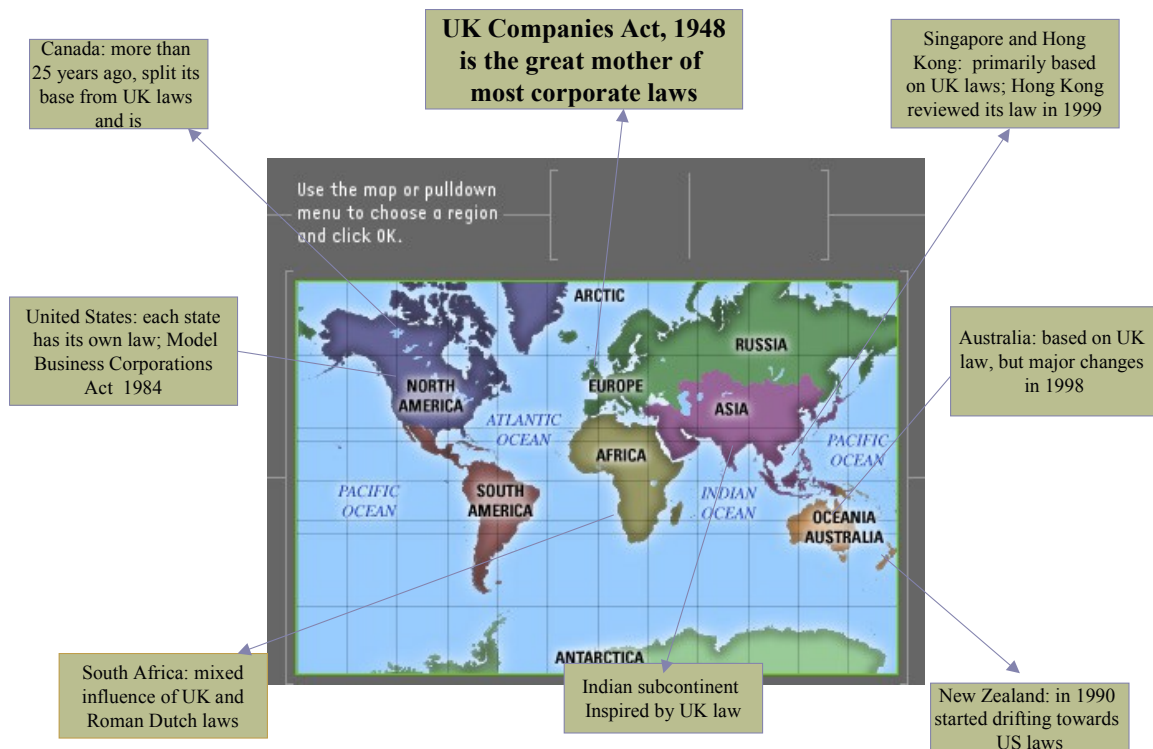
## **2.0 Companies Law**

The basic theory behind all business organizations is that, by combining certain functions within a single entity, a business can operate more efficiently, and thereby realize a greater profit. Governments seek to facilitate investment in profitable operations by creating rules that protect investors in a business from being held personally liable for debts incurred by that business, either through mismanagement, or because of wrongful acts.

Companies law (or the law of business associations) is the field of law concerning business and other organizations. It is an establishment formed to carry on commercial enterprises. This includes corporations, partnerships and other associations which usually carry on some form of economic or charitable activity. Company law is directly related to enterprise: it can either promote it or hold it. Most enterprise is corporatised and corporate regulation has a huge impact on the economy.

## **3.0 Sources of Company Law in Various Countries**

Company law in the commonwealth (UK, Australia, Hong Kong, Singapore, India, Malaysia) has common sources and influences. Common features also exist in European Union and US laws. However, the UK Companies Act 1948 is the great mother of most corporate laws world over, but has undergone several changes over time.



#### 4.0 Companies law in Some Countries

The Company / Corporation (or by whatever other name it may be known in different countries) types of business entity exist and are defined in the legal systems of various countries. There are various types of company that can be formed in different jurisdictions and Countries have their own Company Law to govern them, of which some of them are listed below:

- i. **United States** - US corporations emanated from chartered corporations, allowing people to form corporations under a general corporation law. In the United States, the individual states incorporate most businesses, and some special types are incorporated by the federal government. For federal tax purposes, the Internal Revenue Service has separate entity classification rules. Under the rules, an entity classified as a corporation may be either an S corporation or a C corporation. The main business designations for the State incorporated Corporations are - Corp., Inc. (Corporation, Incorporated), which are used to

denote corporations (public or otherwise). These are the only terms universally accepted by all 51 corporation chartering agencies in the United States. However in some states other suffixes may be used to identify a corporation, such as Ltd., Co./Company, or the Italian term S.p.A. (in Connecticut). Some states that allow the use of "Company" prohibit the use of "and Company", "and Co.", "& Company" or "& Co.". Also Delaware corporation, Nevada corporation are the others. Since the US is a federal system, Company law can vary substantially from state to state. Delaware General Corporation Law is the statute governing corporate law in the state of Delaware. Delaware is well known as a corporate haven. Over 50% of US publicly-traded corporations and 60% of the Fortune 500 companies are incorporated in the state. The Delaware General Corporation Law consists of XVII sub-chapters.

ii. **United Kingdom** – Companies Act, 2006 (CA 2006)

United Kingdom company law is governed by the Companies Act 2006. The Insolvency Act 1986, the Company Directors Disqualification Act 1986, and the old Companies Act 1985 are also important statutes. It applies across the United Kingdom, and is highly influential within Europe around the world.

The Companies Act of United Kingdom consists of 1300 sections under 47 parts and 16 Schedules.

iii. **Germany** – Germany has separate regulatory structure for public and private companies: AG (Aktiengesellschaft) is a German public company and GmbH (Gesellschaft mit beschränkter Haftung) is a German private company

iv. **France** - Two types of companies: Public companies Societe Anonyme (SA) and Private companies called Societe a Responsabilite Limitee, or abbreviated as SARL for which separate law exists. Single member companies, called EURL (Enterprise Unipersonnelle a Responsabilite Limite) also exist.

v. **South Africa** - Republic Of South Africa Companies Act, 1973

vi. **Australia** - Corporations Act, 2001 and Commonwealth Authorities and Companies Act 1997

The Corporations Act of Australia consists of 1471 sections under 7 volumes.

- vii. **Pakistan** - Legal regime for establishment and regulation of companies in Pakistan is given in the Companies Ordinance, 1984. The function of administration of these companies is vested in the Securities and Exchange Commission of Pakistan and the Registrar of companies appointed by the Securities and Exchange Commission of Pakistan for a Province of Pakistan where such company is to be registered. The Ordinance consists of 514 sections under 16 parts with 8 schedules.

## **5.0 Origin of Companies Act in India**

The earliest piece of legislation in India relating to companies was the Act of 1857. Next came the Indian Companies Act, 1866. After this the Companies Act, 1882 was enacted. The Act of 1913 replaced the Indian Companies Act of 1882.

Following the recommendations of the Company Law Committee known as the Bhaba Committee set up in 1950 the Companies Act, 1956, was enacted with the object to amend and consolidate the law relating to companies and certain other associations by repealing the Companies Act, 1913. The Companies Act, 1956, has been amended as many as 24 times since 1956. The major amendment to the Companies Act, 1956, was made after considering the recommendations of the Sachar Committee by enacting the Companies Amendment Act, 1988. The next major amendment was made by the Companies Amendment Act, 2002, consequent to the report of the high powered Eradi Committee. The previous two attempts at making a comprehensive review of the existing law by introducing Companies Amendment Bill 1993 and 1997 failed as the assent of the Parliament could not be received.

## **6.0 The Companies Act 1956**

In India, **the Companies Act, 1956**, is the most important piece of legislation that empowers the Central Government to regulate the formation, financing, functioning and winding up of companies. The Act contains the mechanism regarding organizational, financial, managerial and all the relevant aspects of a company. It provides for the powers

and responsibilities of the directors and managers, raising of capital, holding of company meetings, maintenance and audit of company accounts, powers of inspection, etc. The Act applies to whole of India and to all types of companies, whether registered under this Act or an earlier Act. But it does not apply to universities, co-operative societies, unincorporated trading, scientific and other societies.

The Companies Act is administered by the Central Government through the Ministry of Corporate Affairs and the Offices of Registrar of Companies, Official Liquidators, Public Trustee, Company Law Board, Director of Inspection, etc. The Registrar of Companies (ROC) controls the task of incorporation of new companies and the administration of running companies.

## **7.0 Background of Companies Bill, 2011**

The Ministry of Corporate Affairs took up a comprehensive revision of the Companies Act, 1956 (the Act) in 2004 keeping in view that not only had the number of companies in India expanded from about 30,000 in 1956 to nearly 7 lakhs, Indian companies were also mobilizing resources at a scale unimaginable even a decade ago, continuously entering into and bringing new activities into the fold of the Indian economy. In doing so, they were emerging internationally as efficient providers of a wide range of goods and services while increasing employment opportunities at home. At the same time, the increasing number of options and avenues for international business, trade and capital flows had imposed a requirement not only for harnessing entrepreneurial and economic resources efficiently but also to be competitive in attracting investment for growth. These developments necessitated modernization of the regulatory structure for the corporate sector in a comprehensive manner.

Earlier, a Bill called Companies (Amendment) Bill, 2003 had been introduced by Ministry of Corporate Affairs (MCA) (then Department of Company Affairs) in the Rajya Sabha on 7.5.2003. Later on, a large number of changes were found to be necessary in the Bill. A decision was, therefore, taken to carry out a comprehensive

review of the Companies Act, 1956 and to introduce a new Companies Bill for the consideration of the Parliament.

The review and redrafting of the Companies Act, 1956 was taken up by the Ministry of Corporate Affairs on the basis of a detailed consultative process. A ‘Concept Paper on new Company Law’ was placed on the website of the Ministry on 4th August, 2004. The inputs received were put to a detailed examination in the Ministry. The Government also constituted an Expert Committee on Company Law under the Chairmanship of Dr. J.J. Irani on 2nd December 2004 to advise on new Companies Bill. The Committee submitted its report to the Government on 31st May 2005. After considering the report of the Committee and other inputs received from time-to-time, the Government took up the exercise of comprehensive review of the Companies Act, 1956.

A Companies Bill 2008 was introduced by the Government in the Lok Sabha on October 23, 2008. Due to dissolution of the 14th Lok Sabha, the Companies Bill, 2008 lapsed.

The Government decided to re-introduce the Companies Bill, 2008 as the Companies Bill, 2009, without any change except for the Bill year and the Republic year. The Ministry of Corporate Affairs had introduced the Companies Bill, 2009 in the Lok Sabha on August 3, 2009. The 2009 Bill was referred to Parliamentary Standing Committee on Finance which gave its report on 31<sup>st</sup> August, 2010.

In view of numerous amendments to the Companies Bill 2009 arising out of the recommendations of the Parliamentary Standing Committee on Finance and suggestions of the stakeholders, the Central Government withdrew the Companies Bill 2009 and introduced a fresh bill – The Companies Bill 2011.

The 2011 bill was introduced in Parliament on Wednesday, 14th December 2011.

## **8.0 Highlights of the Companies Bill, 2011**

1. The Companies Bill 2011 contains 29 Chapters, 7 Schedules, 470 clauses as against the Companies Bill, 2009 which consists of 426 clauses under 28 chapters

and the Companies Act, 1956 which consists of 658 sections under 13 Parts and 15 schedules.

2. E-governance in all company processes (Clause 120)
3. Protection to minority shareholders
4. Inclusion of at least one woman director on board (Clause 149)
5. Specific framework for Merger and Acquisitions of companies. Single forum for approval of mergers and acquisitions (Clause 233)
6. Cross Border Mergers (Clause 234)
7. Squeeze Out Provisions (Clause 236)
8. Concept of One Person Company introduced. (Clause 3)
9. Key managerial personnel (KMP) to include Managing Director (MD) or Chief Executive Officer (CEO), Chief Financial Officer (CFO) and Company Secretary (CS).
10. Punishment for personation for acquisition etc. of securities (Clause 38)
11. Class Action Suits (Clause 37; Clause 245)
12. Registered Valuers (Clause 247)
13. Limit on maximum number of members of private company increased to 200 from 50 (Clause 2(68))
14. National Advisory Committee on Accounting Standards (NACAS) to be renamed as National Financial Reporting Authority (NFRA) and changes in responsibilities and powers (Clause 132)
15. Mandatory Rotation of auditors (Clause 139)
16. Mandatory Compliance with Auditing Standards (Clause 143)
17. Limited Liability Partnership eligible to be appointed as Auditor of Company (Clause 141)
18. Corporate Social Responsibility - 2% of average net profits of the previous three years (Clause 135)
19. Mandatory Internal Audit for prescribed classes of companies (Clause 138)
20. Secretarial Standards Introduced and provided statutory recognition (Clause 118(10) & 205)
21. Secretarial Audit (Clause 204)



22. 1/3<sup>rd</sup> of the total number of directors as independent directors - listed public companies
23. Entrenchment Provisions in Articles of Association (Clause 5)
24. Statutory Status to the Serious Fraud Investigation Office (SFIO) (Clause 211)
25. Mediation and Conciliation Panel (Clause 442)

## **9.0 Important Provisions of the Companies Bill, 2011 in Brief**

The Companies Bill, 2011, *inter alia*, provides for—

(i) **E-Governance:-** Maintenance and allowing inspection of documents by companies in electronic form being allowed for the first time.

(ii) Concept of **Corporate Social Responsibility** is being introduced

(iii) **Enhanced Accountability on the part of Companies:**

(a) In addition to the concept of Independent Directors (IDs) introduced, the provisions in respect of their tenure and liability, etc., have been provided. Code for IDs provided in a new Schedule to the Bill. Databank for IDs proposed to be maintained by a body/institute notified by the Central Government to facilitate appointment of IDs.

(b) Corporate Social Responsibility (CSR) Committee of the Board proposed in addition to other Committees of the Board *viz* Audit Committee, Nomination and Remuneration and Stakeholders Relationship Committee. These committees shall have IDs/non-executive directors to bring more independence in Board functioning and for protection of interests of minority shareholders.

(c) Definition of “promoter” also included along with his liability in certain cases.

(d) Provisions in respect of vigil mechanism (whistle blowing) proposed to enable a company to evolve a process to encourage ethical corporate

behaviour, while rewarding employees for their integrity and for providing valuable information to the management on deviant practices. \

(e) The Central Government has been empowered to prescribe restrictions in respect of layers of subsidiaries for any class or classes of companies.

(f) New provisions suggested for allowing re-opening of accounts in certain cases with due safeguards.

**(iv) Additional Disclosure Norms:**

(a) New disclosures like development and implementation of risk management policy, Corporate Social Responsibility Policy, manner of formal evaluation of performance of Board of directors and individual directors included in the Board report in addition to disclosures proposed in such report in the Companies Bill, 2009.

(b) Consolidation of accounts: Accounts of Foreign subsidiaries to be attached for filing them with the Registrar. Subsidiary to include “associate” and “joint venture” for the purpose of consolidation.

(c) Every listed company required to file a return with the Registrar regarding change in the shareholding position of promoters and top ten shareholders of such company.

**(v) Facilitating raising of capital by companies:**

(a) Provisions for offer or invitation for subscription of securities on private placement basis revised to ensure more transparency and accountability.

(b) Companies being allowed to issue equity shares with differential voting rights.

(c) Central Government empowered to prescribe, through rules, the requirements in connection with provision for money made by a company for allowing purchase of company's shares by its employees under a scheme for their benefit. Disclosure to be made in the Board's report in respect of voting rights not exercised directly by the employees in respect of shares to which the scheme relates.

**(vi) Audit Accountability:**

(a) Rotation of auditors and audit firms being provided for.

(b) Stricter and more accountable role for auditor being retained. Provisions relating to prohibiting auditor from performing non-audit services revised to ensure independence and accountability of auditor. Subject to the maximum prescribed number of companies, the members of a company may resolve that the auditor or audit firm of such company shall not become auditor in companies beyond the number as may be specified in such resolution.

(c) National Advisory Committee on Accounting and Auditing Standards (NACAAS) proposed to be renamed as National Financial Reporting Authority (NFRA) with a mandate to ensure monitoring and compliance of accounting and auditing standards and to oversee quality of service of professionals associated with compliance.

The Authority shall consider the International Financial Reporting Standards and other internationally accepted accounting and auditing policies and standards while making recommendations on such matters to the Central Government which will improve the competitiveness of our companies with other companies. The Authority is also proposed to be empowered with quasi judicial powers to ensure independent oversight over professionals.

(d) Cost Audit: Cost records to be mandated for companies engaged in production of such goods or rendering of such services as may be prescribed.

The concept of “cost auditing standards” being mandated.

(e) Secretariat Audit: Prescribed class of companies would need to attach with the Board’s Report, a Secretarial Audit Report given by a company secretary in practice.

**(vii) Managerial Remuneration:**

(a) Provisions relating to limits on remuneration provided in the existing Act (11% of net profits) included.

(b) For companies with no profits or inadequate profits remuneration shall

be payable in accordance with new Schedule of Remuneration annexed to the Bill and in case a company is not able to comply with such Schedule, approval of Central Government would be necessary. Individual limits for remuneration enhanced in the Bill *vis-à-vis* the existing limits. Concept of payment of periodic fees which shall include sitting fees to directors being included in the Bill.

(c) Independent Directors (IDs) not to get stock option: IDs not to get stock option but may get payment of fees and profit linked commission subject to limits specified in the Bill/rules. Central Government may prescribe amount of fees under the rules.

**(viii) Facilitating Mergers/ Acquisitions:**

Simplified procedure (through confirmation by the Central Government), laid down for compromise or arrangement including for merger or amalgamation of holding companies and wholly owned subsidiary(ies), between two or more small companies and for such other class or classes of companies as may be prescribed. This would result into faster decisions on approvals for mergers and amalgamations resulting effective restructuring in companies and growth in the economy. For other companies, such matters would be approved by Tribunal.

**(ix) Protection for Minority Shareholders:**

(a) Exit option to shareholders in case of dissent to change in object for which public issue was made.

(b) Specific disclosure regarding effect of merger on creditors, key managerial personnel, promoters and non-promoter shareholders is being provided. The Tribunal is being empowered to provide for exit offer to dissenting shareholders in case of compromise or arrangement.

(c) The Board may have a director representing small shareholders who may be elected in such manner as may be prescribed by rules.

**(x) Investor Protection:**

(a) Acceptance of deposits from public subject to a more stringent regime.

(b) Central Government to have power to prescribe class or classes of companies which shall not be permitted to allow use of proxies. The Bill also to have provisions to provide that a person shall have proxies for such number of members /such shares as may be prescribed.

(c) Provisions for Class Action Suits revised to provide minimum number of persons who may apply for such suits. Safeguards against misuse of these provisions also being included.

(xi) **Serious Fraud Investigation Office (SFIO):** Statutory status to SFIO proposed. Investigation report of SFIO filed with the Court for framing of charges shall be treated as a report filed by a Police Officer. SFIO shall have power to arrest in respect of certain offences of the Bill which attract the punishment for fraud. Those offences shall be cognizable and the person accused of any such offence shall be released on bail subject to certain conditions provided in the relevant clause of the Bill. Definition of 'Fraud' provided. Stringent penalty provided for fraud related offences.

(xii) **Woman Director:** At least one woman director being made mandatory in the prescribed class or classes of companies.

(xiii) **National Company Law Tribunal (Tribunal):** Keeping in view the Supreme Court's judgment, on the 11th May, 2010 on the composition and constitution of the Tribunal, modifications relating to qualification and experience, etc., of the members of the Tribunal have been made. Appeals from Tribunal shall lie to National Company Law Appellate Tribunal.

(xiv) **Mediation and Conciliation Panel:** It is proposed to create and maintain as "Mediation and Conciliation Panel" for facilitating mediation and conciliation between parties during any proceeding under the proposed Legislation before the Central Government or Tribunal.

(xv) Central Government to have power to exempt/modify provisions of the Act

for a class or classes of companies in public interest. Relevant notification shall be required to be laid in draft form in Parliament for a period of thirty days.

## **10.0 Provisions of the Companies Bill, 2011 in Detail**

The Companies Bill 2011 contains 29 Chapters, 7 Schedules, 470 clauses as against the Companies Bill, 2009 which consists of 426 clauses under 28 chapters and the Companies Act, 1956 which consists of 658 sections under 13 Parts and 15 schedules.

### A. Tabular Comparative Analysis – Companies Bill 2009; Companies Bill 2011 and Companies Act 1956

<b>Chapter</b>	<b>Title</b>	<b>Clauses as per 2011 Bill</b>	<b>Clauses as per 2009 Bill</b>	<b>Corresponding sections of Companies Act, 1956</b>
1	Preliminary	1, 2	1, 2	1 to 10
2	Incorporation of companies	3 to 22	3 to 21	11 to 54
3	Prospectus and allotment of securities	23 to 42	22 to 36	55 to 81
4	Share capital and debentures	43 to 72	37 to 65	82 to 123
5	Acceptance of deposits by companies	73 to 76	66 to 68	58A to 58B
6	Registration of charges	77 to 87	69 to 77	124 to 145
7	Management and administration	88 to 122	78 to 109	146 to 197
8	Declaration and payment of dividend	123 to 127	110 to 115	205 to 207
9	Accounts of companies	128 to 138	116 to 122	209 to 223
10	Audit and auditors	139 to 148	123 to 131	224 to 233B
11	Appointment and	149 to 172	132 to 153	252 to 284

	qualification of directors			
12	Meeting of Board and its powers	173 to 195	154 to 173	285 to 308
13	Appointment and remuneration of managerial personnel	196 to 205	174 to 178	309 to 311
14	Inspection, Inquiry and Investigation	206 to 229	179 to 200	234 to 251
15	Compromise, Arrangements and Amalgamations	230 to 240	201 to 211	390 to 396A
16	Prevention of oppression and mismanagement	241 to 246	212 to 217	397 to 409
17	Registered valuers	247	218 to 223	
18	Removal of names of companies from the Register	248 to 252	224 to 228	560
19	Revival and rehabilitation of sick companies	253 to 269	229 to 244	424A to 424L
20	Winding up	270 to 378	245 to 340	425 to 559
21	Companies incorporated outside India	379 to 393	341 to 355	591 to 608
22	Government companies	394, 395	356, 357	617 to 620
23	Registration offices and fees	396 to 404	358 to 365	609 to 614A
24	Companies to furnish information and statistics	405	366	615
25	Nidhis	406	367	620A
26	NCLT and NCLAT	407 to 434	368 to 395	10FB to 10GF
27	Special Courts	435 to 446	396 to 406	
28	Miscellaneous	447 to 470	407 to 426	621 to 658

B) An analysis of the Important provisions of the Companies Bill, 2011:

## **I. General**

- The Bill applies to the whole of India and is also applicable to certain companies or bodies corporate governed by Special Acts
- A very substantial part of the Bill will be in form of rules , which will be prescribed separately
- The Government of India, has the power to notify different provision of the Act at different point of time.
- The Financial Year of any Company can be only from April-March and only certain companies complying with certain conditions can have a different financial year with the approval of Tribunal. Under the Companies Act 1956, there was no restriction on the period of financial year.
- The maximum number of members, which a Private Company can have, is increased from 50, as provided in the Companies Act 1956 (and Companies Bill 2009), to 200 (except in case of One Person Company).
- The scope of “officer who is in default” has been broadened. The share transfer agents, registrars and merchant bankers to the issue or transfer related to issue of shares & Chief Financial Officer are also brought under its ambit. Directors who are aware of the default by way of participation in board meeting or receiving the minutes without objecting to the same will also be included in this category even if company has Managing Director /Whole Time Director / other Key Managerial Personnels.
- Defaults of procedural nature to be penalized by levy of monetary penalties by adjudicating officers not below level of Registrar. Appeals against such orders will lie with designated higher authorities.

## **II. Definitions**



There are 95 definitions under the Companies Bill, 2009 while there are only 66 definitions under the Companies Act, 1956. Some of the important definitions in the Companies Bill, 2011 are given hereunder.

1. **“Associate Company”**, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company. Explanation - For the purpose of this clause, “significant influence” means control of at least twenty percent of total share capital, or of business decisions under an agreement. (Clause 2(6))
2. **“Auditing standards”** means the standards of auditing or any addendum thereto for companies or class of companies referred to in sub-section (10) of section 143. (Clause 2(7))
3. **“Chief Executive Officer”** means an officer of a company, who has been designated as such by it (Clause 2(18))
4. **“Chief Financial Officer”** means a person appointed as the Chief Financial Officer of a company (Clause 2(19))
5. **“Employees’ Stock Option”** means the option given to the directors, officers or employees of a company or of its holding company or subsidiary company or companies, if any, which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price. (Clause 2(37))
6. **“Financial statement”** in relation to a company, includes-
  - (i) A balance sheet as at the end of the financial year;
  - (ii) A profit and loss account, or in the case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;
  - (iii) Cash flow statement for the financial year; and
  - (iv) Any explanatory note attached to, or forming part of, any document referred to in sub-clause(i) to sub-clause (iv):  
Provided that the financial statement, with respect to One Person

Company, small company and dormant company, may not include the cash flow statement. (Clause 2(40))

7. **“Financial Year”** in relation to any company or body corporate, means the period ending on the 31<sup>st</sup> day of March every year, and where it has been incorporated on or after the 1<sup>st</sup> day of January of a year, the period ending on the 31<sup>st</sup> day of March of the following year, in respect whereof financial statement of the company or body corporate is made up:
- Provided that on an application made by a company or body corporate, which is a holding company or a subsidiary of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Tribunal may, if it is satisfied, allow any period as its financial year, whether or not that period is a year:
- Provided further that a company or body corporate, existing on the commencement of this Act, shall, within a period of two years from such commencement, align its financial year as per the provisions of this clause; (Clause 2(41))
8. **“Global Depository Receipt (GDR)”** means any instrument in the form of a deposit receipt, by whatever name called created by a foreign depository outside Indian and authorized by a company making an issue of such depository receipts. (Clause 2(44))
9. **“Independent Director”** means an independent director referred to in sub-section (5) of section 149. (Clause 2(47))
10. **“Key managerial personnel”** in relation to a company, means –
- (i) the Chief Executive Officer or the managing director or the manager;
  - (ii) the company secretary;
  - (iii) the Chief Financial Officer if the Board of Directors appoints him; and
  - (iv) such other officer as may be prescribed; (Clause 2(51))
11. **“One Person Company”** means a company which has only one person as a member. (Clause 2(62))

12. **“Promoter”** means a person who-

- (a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or
- (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
- (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act:

Provided that nothing in sub-clauses (b) and (c) shall apply to a person who is acting in a professional capacity; (Clause 2(69))

13. **“Related party”** with reference to a company means-

- (i) a director or his relative;
- (ii) a key managerial personnel or his relative;
- (iii) a firm, in which a director, manager or his relative is a partner;
- (iv) a private company in which a director or manager is a member or director;
- (v) a public company in which a director or manager is a director or holds along with his relatives, more than two per cent. of its paid-up share capital;
- (vi) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;
- (vii) any person on whose advice, directions or instructions a director or manager is accustomed to act:

Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

(viii) any company which is—

- (A) a holding, subsidiary or an associate company of such company; or
- (B) a subsidiary of a holding company to which it is also a subsidiary;
- (ix) such other person as may be prescribed; (Clause 2(76))

14. **“Small company”** means a company, other than a public company,

- (i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or
- (ii) turnover of which as per its last profit and loss account does not exceed two

crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:

Provided that nothing in this clause shall apply to—

- (A) a holding company or a subsidiary company;
  - (B) a company registered under section 8; or
  - (C) a company or body corporate governed by any special Act;
- (Clause 2(85))

15. **“Turnover”** means the aggregate value of the realisation of amount made from the sale, supply or distribution of goods or on account of services rendered, or both, by the company during a financial year; (Clause 2(91))

### **III. Types of Companies**

#### **A. One Person Company -**

The concept of a “one-person company”, or OPC, has been introduced in the Bill, and the intent is apparently to permit entrepreneurship of a single individual to obtain the benefit of a corporate form of organization.

According to Clause 2(62) of the Companies Bill, 2011 **“One Person Company”** means a company which has only one person as a member. It is a one shareholder corporate entity, where legal and financial liability is limited to the company only.

Some important features of the Bill in this regard are:

- The One Person Company will be formed as a private limited company.
- “One Person Company” means a company which has only one person as a member (clause 2(62))
- The words “One Person Company” shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved (Proviso to Clause 12(3))

- One Person Company may be formed for any lawful purpose as a private Company with one member (Clause 3(1)(c) of the Companies Bill, 2011) and shall have a minimum of 1 director and can have a maximum of 15 directors (Clause 149(1)(a) and (b) of the Companies Bill 2011)  
(Provided that a company may appoint more than fifteen directors after passing a special resolution. Also such class or classes of companies as may be prescribed, shall have at least one woman director)
- The memorandum of a One Person Company has to prescribe the name of the person who in the event of death of the subscriber shall become the member of the company. (Clause 4(1)(f) of the Companies Bill, 2011)
- Annual return of a One Person Company should be signed by the Company Secretary, or where there is no Company Secretary, by one director of the company. (proviso to Clause 92 (1) ))
- Provision of Annual General Meeting is not applicable for a One Person Company. (Clause 96(1))
- Where One person Company enters into a contract with the sole member of the company who is also a director (excluding contracts entered into by the company in the ordinary course of business), the company should, unless the contract is in writing, ensure that the terms of the contract or offer are contained in the memorandum or are recorded in the minutes of the first Board meeting held after entering into the contract. The Company shall inform the Registrar about every such contract within 15days of the date of approval by the Board. (Clause 193)

## **B. Small Company –**

The concept of Small Company has also been introduced in the Companies Bill, 2011.

According to (Clause 2(85) of the Companies Bill, 2011, “**Small company**” means a company, other than a public company, -

- (i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or
- (ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:

Provided that nothing in this clause shall apply to—

- (A) a holding company or a subsidiary company;
- (B) a company registered under section 8; or
- (C) a company or body corporate governed by any special Act;

### **C. Classification of companies –**

The Companies Act, 1956 broadly classifies the companies into private and public companies and provides for regulatory environment on the basis of such classification. However, with the growth of the economy and increase in the complexity of business operation, the forms of corporate organizations keep on changing. Classification of Companies can therefore take many shapes and a multiple classification of companies can be made.

i) On the basis of size:

- a. Small companies
- b. Other companies

ii) On the basis of number of members:

- a. One person company
- b. Private companies
- c. Public companies

- iii) On the basis of control:
  - a. Holding companies
  - b. Subsidiary companies
  - c. Associate Company
  
- iv) On the basis of liability
  - a. Limited
    - I) by Shares
    - II) by Guarantee (with or without share capital)
  - b. Unlimited
  
- v) On the basis of manner of access to capital
  - a. Listed companies
  - b. Un-listed companies
  
- vi) On the basis of nature of business
  - a. Companies with charitable objects etc. (Clause 8 of the Companies Bill 2011)
  - b. Dormant Company (Clause 455 of the Companies Bill 2011)
  - c. Companies incorporated outside India (Chapter XXII of the Companies Bill 2011)
  - d. Government Companies (Chapter XXIII of the Companies Bill 2011)
  - e. Nidhi Companies (Chapter XXVI of the Companies Bill 2011)

#### **D. Commencement of Business –**

The provisions with regard to Certificate of Commencement of business have been dispensed with under the Companies Bill, 2011. Only declaration and verification is required by the Public Company under the Companies Bill, 2011.

#### **IV. Incorporation of company**

- The number of documents to be submitted for registration has been increased under the Companies Bill, 2011 compared to the lesser number of documents to be submitted under the Companies Act, 1956.
- Clause 7(1) of Companies Bill, 2011 lists the documents and information for registration
- Documents to be filed at the time of incorporation should also contain name of first directors, their Director Identification Number (DIN), address etc, along with their consent and particulars of interest. (Clause 7(1)(f) of Companies Bill, 2011)
- The provision with regard to printing of Memorandum under Section 15 of the Companies Act, 1956 has been dispensed with under the Companies Bill, 2011.
- A company of any class registered under this Act may convert itself as a company of other class under this Act by alteration of memorandum and articles of the company in accordance with the provisions of Chapter II of the Act. ( Clause 18(1))
- In the Memorandum of Association of the Company, there is no requirement as to bifurcation of the objects clause into main, ancillary and other objects. Only objects for which company is incorporated along with matters considered necessary for its furtherance shall be mentioned. The Company cannot provide for other object clause.
- Articles of Association of the Company may contain provision with respect to entrenchment. Entrenchment provisions provide a more restrictive procedure than passing a special resolution for altering certain provisions in the Articles.
- For commencement of business by public/private Company, following needs to be filed with the registrar of companies
  - o declaration by director in prescribed form providing that the



subscribers have paid the value of shares agreed to be taken by them, and  
o Confirmation that the company has filed a verification of its registered office, with the Registrar.

- Company, which has raised money from public through prospectus and still has any unutilised amount out of the money so raised, shall not change its objects unless a special resolution is passed by the company and other requirements of advertisement and exit opportunity to dissenting shareholders is complied with, there was no such requirement under the Companies Act 1956

## **V. Prospectus and Allotment of Securities**

- The Bill governs the issue of all types of securities now, under the Companies Act 1956, only shares and debentures were covered.
- The Bill provides that a Public company can only issue securities by following the provisions related to public offer or Private Placement or by way of bonus or right issue .
- A Private company may issue securities only through private placement by complying with the provisions of Part II of Chapter III.
- Raising of capital by Private Placement basis – new provisions to ensure more transparency and accountability (Clause 42)
- The number of persons to which company may make an offer or invitation of securities to a section of the public otherwise than through issue of a prospectus, by way of private placement basis and maximum investment size in such case, shall be prescribed by way of rules, under the Companies Act 1956 the maximum number of persons prescribed was 50.
- QIB shall not be covered under the provisions related to Private Placement
- If a company, listed or unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the prescribed number of persons, whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognised

stock exchange in or outside India, the same shall be deemed to be an offer to the public and shall accordingly be governed by the provisions provided in this regard by SEBI.

- Any company making any offer or invitation of securities under private placement has to allot the securities within 60 days of receipt of application money.
- Disgorgement provisions to deter personation for acquiring securities (Clause 38)
- New enabling provisions for issue of GDR's - Companies may now issue Global Depository Receipt by passing a special resolution in its general meeting and subject to such conditions as may be prescribed.
- The content to be prescribed in the Prospectus has now been made more detailed.
- A company shall not, at any time, vary the terms of a contract referred to in the prospectus or objects for which the prospectus was issued, except subject to the approval of, or except subject to an authority given by the company in general meeting by way of special resolution (Clause 27(1))
- The dissenting shareholders being those shareholders who have not agreed to the proposal to vary the terms of contracts or objects referred to in the prospectus, shall be given an exit offer by promoters or controlling shareholders at such exit price, and in such manner and conditions as may be specified by the Securities and Exchange Board by making regulations in this behalf (Clause 27(2))
- The Bill provides provisions with respect to offer of sale by existing shareholders of the company.
- Any company specified by Securities and Exchange Board (SEBI) Regulations in this regard, may file a shelf prospectus (a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus) with the Registrar at the stage of the first offer of securities included therein which shall indicate a period not exceeding one year as the period of validity of such prospectus which shall commence from the date of opening of the first offer of securities under that prospectus, and in respect of a second or subsequent offer of such securities issued during the period of validity of that prospectus, no further prospectus is required.

- A company proposing to make an offer of securities may issue a Red Herring prospectus (a prospectus which does not include complete particulars of the quantum or price of the securities included therein) prior to the issue of a prospectus.
- Provisions relating to Statement in lieu of Prospectus in the Companies Act 1956, omitted from the Companies Bill 2011
- If it is proved that prospectus was issued with intent to defraud the applicants or any other person or for a fraudulent purpose, the directors, promoters, experts etc. shall be personally responsible without any limitation of liability for all or any of the losses / damage that may have been incurred by any person who subscribed to the securities on the basis of such prospectus (Clause 35(3))
- Class Action Suits in case of misleading prospectus - A suit can be filed or any action can be taken by any person, group of persons or association of persons who have been affected by misleading statement or inclusion or omission of any matter in the prospectus. (Clause 37 of Companies Bill, 2011)

## **VI. Share Capital and Debentures**

- Where dividends payable in respect of a class of preference shares are in arrears for a period of 2 years or more, such class of preference shareholders will have a right to vote on all resolutions placed before a meeting of the company. This voting right is irrespective whether the preference shares are cumulative or non-cumulative. (Clause 47)
- If variation of rights by one class of shareholders affects the rights of any other class of shareholders, the consent of atleast 75% of such other class of shareholders shall also be obtained and provisions of Clause 48 shall apply to such variation
- Company cannot issue shares at a discount other than as sweat equity shares.
- As opposed to Companies Act, 1956, under the new Bill, a company may issue preference shares redeemable after 20 years for such infrastructure projects as may be specified subject to redemption of specified % of preference shares on

annual basis at the option of the preference shareholder. The term Infrastructure projects has been defined for the purpose of this section as the infrastructure projects specified in Schedule VI to the Bill.

- The provisions related to further issue of capital will now be applicable to all types of Companies.
- Apart from existing shareholders, if the company having share capital at any time, proposes to increase its subscribed capital by the issue of further shares, such shares may also be offered to employees by way of Employee Stock Options subject to approval of shareholders by way of special resolution and subject to prescribed conditions.
- New enabling provisions for issue of Bonus Shares provide that a company may issue fully paid up bonus shares to its members, in any manner out of – i. Its free reserves; ii. The Security premium account or iii. The Capital Redemption Reserve Account. No issue of bonus shares shall be made by capitalizing reserves created by the revaluation of assets. Bonus shares shall not be issued in lieu of dividend.
- No reduction of capital will be allowed if the company is in arrears for payment of deposits, accepted either before or after the commencement of this Act, or the interest payable thereon. (Clause 66)
- Special Resolution required to issue Debentures with a conversion option (Clause 77)
- No company shall issue any Debentures carrying any voting rights (Clause 71(2))
- Secured debentures to be issued only subject to prescribed terms and conditions (Clause 71(3))
- Compulsory to create a Debenture Redemption Reserve Account out of the profits of the company available for payment of dividend and the amount credited to such account shall be utilized only for the purpose of redemption of debentures. (Clause 71(4))
- Appointment of Debenture Trustee compulsory for public issue of debentures through prospectus to more than 500 persons. (Clause 71(5))

## **VII. Acceptance of Deposits by companies**

- Acceptance of deposits from public (i.e persons other than members) has been prohibited. Deposits can be accepted only from members subject to compliance of certain conditions. (Clause 73)
- On and after the commencement of the Companies Act 2011, only the following companies may invite, accept or renew deposits from the public – i. Banking companies; ii. Non Banking Financial Companies (NBFC); iii. notified companies; iv. public company having such net worth or turnover as may be prescribed as per audited balance sheet of the immediately preceding financial year
- A company other than those specified above, may invite, accept or renew deposits only from its members subject to fulfillment of the following conditions (Clause 73):
  1. passing of resolution in a general meeting
  2. issue of circular to members showing the financial position of the company, the credit ratings obtained, the total number of depositors and the amount due towards deposits in respect of any previous deposits accepted by the company etc.
  3. filing a copy of the circular with the registrar within 30 days before the date of issue of the circular.
  4. An amount of not less than 15% of the deposits maturing during a financial year shall be deposited in deposit repayment reserve account.
  5. Providing deposit insurance.
  6. Certification by the company that it has not defaulted in the repayment of deposits.
  7. Provision of security in respect of deposit and interest and creation of charge on company's properties and assets.

- The penalty for failure to repay deposit has been made extremely stringent. The depositor may apply to Tribunal for an order directing the company to pay the sum due or loss or damage incurred by him as result of non-payment (Clause 73).

### **VIII. Registration of Charges**

- The scope of the term “charge” has been enlarged. As per Clause 2(16) “charge” means an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage;
- The specific list of cases in which it was necessary to register the charge, as provided by in the Companies Act 1956 has been dispensed with. Now all types of charge created by the company on its property or assets or any of its undertakings would be required to be registered.
- Every company creating a charge within or outside India on its property or assets or any of its undertakings should register the particulars of the charge with the Registrar within thirty days of its creation. If the company fails to register the charge within the prescribed period, then the person in whose favour the charge is created can apply to the Registrar for registration of the charge along with the instrument created for the Charge. (Clause 77)

### **IX. Management and Administration**

- Annual return in such form as may be prescribed should form part of the Board’s report. (Clause 92(3))
- Return to be filed by listed company in the prescribed form with Registrar of Companies (ROC) in case promoter’s stake changes. The return shall be filed with respect to change in the number of shares held by promoters and

top ten shareholders of such company, within 15 days of such change. (Clause 93)

- One Person Companies are not required to hold Annual General Meeting (AGM). All other companies are required to hold AGM in each calendar year within the prescribed time limits. (Clause 96)
- The AGM has to be called during business hours i.e between 9:00am and 6:00pm.
- Annual General Meeting can be called on a “public holiday” but not on a “National Holiday”. “National Holiday” means and includes a day declared as such by the Central Government. (Clause 96(2))
- Increase in Quorum requirements for public companies having more than 1000 members. (Clause 103)
- Voting through electronic means by members at meetings is permitted (Clause 108)
- A company shall transact the items of business notified by the Central Government by means of postal ballot. It can also transact any item of business other than ordinary business and any business in respect of which directors or auditors have a right to be heard at any meeting. This can be done by means of postal ballot instead of transacting such business at a general meeting. (Clause 110)
- Resolutions requiring Special Notice – Presently there is no requirement as to members who give special notice to hold some minimum voting power or shares. Clause 115 introduces such a requirement by providing that the resolution requiring special notice has to be moved by such number of members holding not less than one per cent of total voting power or holding shares on which an aggregate sum of not less than one lakh rupees has been paid-up.
- Every listed public company should file a report on each annual general meeting with the Registrar of Companies within 30 days of the conclusion of the annual general meeting. (Clause 121)

- Provisions relating to Statutory meeting and Statutory report dispensed with.

## **X. Declaration and payment of dividend**

- No dividend shall be declared or paid by a company from its reserves other than free reserves (Third Proviso to Clause 123(1))
- The Board of Directors of a company may declare interim dividend during any financial year out of the surplus in the Profit and Loss Account and out of profits of the financial year in which such interim dividend is sought to be declared. (Clause 123(3))

In case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.

- Instead of transferring a fixed % of profits to reserve before declaring dividend every year , company can on their discretion transfer such % of profit to the reserve before declaring dividend as it deem necessary and moreover such transfer is also not mandatory. (Clause 123(1))
- Where a dividend has been declared by a company but has not been paid or claimed within thirty days from the date of the declaration to any shareholder entitled to the payment of the dividend, the company shall, within seven days from the date of expiry of the said period of thirty days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in that behalf in any scheduled bank to be called the Unpaid Dividend Account (Clause 124(1))
- The amounts in the Unpaid Dividend Account of companies which have remained unclaimed and unpaid for a period of 7 years from the date they became



due for payment shall be transferred by a company to the Investor Education and Protection Fund.

- Unpaid dividend can be claimed any time and the time limit of seven years will not apply.

## **XI. Accounts of Companies**

- The Bill permits the maintenance of books of accounts and other books and papers in electronic mode (Second Proviso to Clause 128(1))
- Where an investigation has been ordered in respect of the company under Chapter XIV, the Central Government may direct that the books of account may be kept for such longer period as it may deem fit. (Proviso to Clause 128(5))
- If the company has one or more subsidiaries, then along with financial statement, consolidated financial statement of the company and all its subsidiaries will be prepared in the same form and manner as its own and shall also be laid before the Annual General Meeting. Subsidiary shall for the purpose of this requirement include associate company and joint venture. The provisions of this Act applicable to the preparation, adoption and audit of the financial statements of a holding company shall, mutatis mutandis, apply to the consolidated financial statements also.
- Reopening of Accounts on Court's or Tribunal's Order - A company shall not re-open its books of account and not recast its financial statements, unless an order in this regard is made by a court of competent jurisdiction or the Tribunal. The accounts so revised or re-cast shall be final. (Clause 130)
- Voluntary Revision of Financial Statements or Board's Report may be made with Tribunal's consent (Clause 131)
- Constitution of National Financial Reporting Authority - The National Advisory Committee on Accounting Standards (NACAS as introduced by the Companies Bill 2009) has been renamed National Financial Reporting Authority (NFRA) and unlike NACAS it is not merely an advisory body.

- The mandate of the NFRA is to:
  - (i) make recommendations to the Central Government on the formulation and laying down of accounting and auditing policies and standards for adoption by companies or class of companies or their auditors, as the case may be;
  - (ii) monitor and enforce the compliance with accounting and auditing standards recommended by it in such manner as may be prescribed;
  - (iii) oversee the quality of service of the professions associated with ensuring compliance with such standards, and suggest measures required for improvement in quality of services and such other related matters as may be prescribed; and
  - (iv) perform such other functions as may be prescribed.
- Additional Disclosure - The Board of Director's report for every company except for One Person Company, shall have various types of additional information (Clause 134)
- The Directors responsibility statement in case of listed company shall also include additional declarations related to internal financial controls and compliance systems (Clause 134(5))
- Corporate Social Responsibility (CSR) Obligations introduced - Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director. 2% of average net profits of the previous three years will have to be spent on corporate social responsibility activities with disclosure to shareholders about the policy adopted in the process, giving reasons on failure of implementation (Clause 135)
- Compulsory Internal Audit for certain prescribed companies (Clause 138)

## **XII. Audit and Auditors**

- Subject to the provisions of Chapter X of the Bill, every company shall, at the first annual general meeting, appoint an individual or a firm as an auditor who shall hold office from the conclusion of that meeting till the conclusion of its sixth annual general meeting and thereafter till the conclusion of every sixth meeting and the manner and procedure of selection of auditors by the members of the company at such meeting shall be such as may be prescribed. (Clause 139)
- The Bill provides for compulsory rotation of individual auditors and of audit firm. No listed company or a company belonging to such class or classes of companies as may be prescribed, shall appoint or re-appoint—  
(a) an individual as auditor for more than one term of five consecutive years; and  
(b) an audit firm as auditor for more than two terms of five consecutive years. (Clause 139(2)). Also, enabling provisions for members to resolve rotation of audit partners and his team are provided in the Bill.
- 5-years tenure for auditors appointed at Annual General Meetings (AGMs) of companies (other than Government Companies/ Government Controlled Companies) instead of annual appointment/ re-appointment
- Automatic reappointment of existing auditor (without passing any resolution) at AGM where no auditor is appointed/ reappointed at AGM.
- Limited Liability Partnerships may be appointed as Auditors (Clause 141)
- Auditing Standards to be made mandatory (Clause 143)
- If an auditor of a company, in the course of the performance of his duties as auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, he shall immediately report the matter to the Central Government within such time and in such manner as may be prescribed. (Clause 143). This duty which has been cast on auditor, shall apply mutatis mutandis to both cost accountant for cost audit and company secretary in practice for secretarial audit.
- Auditor not to render certain services – (Clause 144)  
An auditor appointed under this Act shall provide to the company only such other

services as are approved by the Board of Directors or the audit committee, as the case may be, but which shall not include any of the following services (whether such services are rendered directly or indirectly to the company or its holding company or subsidiary company or associate company), namely:—

- (a) accounting and book keeping services;
- (b) internal audit;
- (c) design and implementation of any financial information system;
- (d) actuarial services;
- (e) investment advisory services;
- (f) investment banking services;
- (g) rendering of outsourced financial services;
- (h) management services; and
- (i) any other kind of services as may be prescribed.

The term “directly or indirectly” shall include rendering of services by the auditor,— (i) in case of auditor being an individual, either himself or through his relative or any other person connected or associated with such individual or through any other entity, whatsoever, in which such individual has significant influence or control, or whose name or trade mark or brand is used by such individual; (ii) in case of auditor being a firm, either itself or through any of its partners or through its parent, subsidiary or associate entity or through any other entity, whatsoever, in which the firm or any partner of the firm has significant influence or control, or whose name or trade mark or brand is used by the firm or any of its partners.

- All notices of, and other communications relating to, any general meeting shall be forwarded to the auditor of the company, and the auditor shall, unless otherwise exempted by the company, attend either by himself or through his authorised representative, who shall also be qualified to be an auditor, any general meeting and shall have right to be heard at such meeting on any part of the business which concerns him as the auditor. (Clause 146)
- Increased Accountability of Auditors (Clause 147)

### **XIII. Appointment and Qualifications of Directors**

- In prescribed class or classes of companies, there should be atleast 1 woman director. (Second Proviso to Clause 149(1))
- Every Company to have atleast one director who has stayed in India for one hundred and eighty-two days or more in the previous calendar year. (Clause 149)
- A company can have a maximum number of 15 directors. However, a company may appoint more than 15 directors by passing a special resolution. No Central Government approval required.
- Every listed public company shall have at least one-third of the total number of directors as independent directors and Central Government may prescribe the minimum number of independent directors in case of any class or classes of public company. (Clause 149(3))
- An independent director shall not be entitled to any remuneration, other than sitting fee, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members.
- The provisions in respect of the tenure and liability of the Independent director have been provided
- The Code for Independent Directors provided in a new Schedule to the Bill. The Schedule to the Bill provides the following in respect of an Independent Director
  - Professional Conduct
  - Role & Functions
  - Duties
  - Manner of Appointment
  - Removal & Resignation etc
- A databank of Independent directors proposed to be maintained by a body/institute notified by the Central Government to facilitate appointment of Independent directors.
- A person cannot become directors in more than 20 companies instead of 15 as provided in the Companies Act 1956 and out of this 20, he cannot be director of

more than 10 public companies. For reckoning the limit of public companies in which a person can be appointed as director, directorship in private companies that are either holding or subsidiary company of a public company shall be included. The members of a company may, by special resolution, specify any lesser number of companies in which a director of the company may act as directors.

- Duties of the directors towards the company specified (Clause 166)
- A director may resign from his office by giving a notice in writing to the company and the Board shall on receipt of such notice take note of the same and the company shall intimate the Registrar in such manner, within such time and in such form as may be prescribed and shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting by the company. A director shall also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within thirty days of resignation in such manner as may be prescribed. (Clause 168)

#### **XIV. Meetings of Board**

- Not more than 120 days gap between two Board Meetings (Clause 173)
- Director can participate in the Board meeting either in person or through video conferencing or other audio visual means as may be prescribed which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time. The Central Government may, by notification, specify such matters which shall not be dealt with in a meeting through video conferencing or other audio visual means (Clause 173)
- A notice of not less than seven days in writing is required to call a board meeting and notice of meeting to all directors shall be given, whether he is in India or outside India by hand delivery or by post or by electronic means. A meeting of the Board may be called at shorter notice to transact urgent business subject to the

condition that at least one independent director, if any, shall be present at the meeting. In case of absence of independent directors from such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any. (Clause 173)

- Audit Committee - Every Listed Company and such other company as may be prescribed shall form Audit Committee. The Audit Committee shall comprise of minimum 3 directors Independent Directors forming a majority and majority of members of committee including its Chairperson shall be person with ability to read and understand financial statement. (Clause 177)
- Nomination and Remuneration Committee - Every listed company and prescribed class or classes of companies, shall constitute the Nomination and Remuneration Committee consisting of three or more non-executive directors out of which not less than one half shall be independent directors. (Clause 178(1))
- Stakeholders Relationship Committee - Every company which consists of more than one thousand shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year shall constitute a Stakeholders Relationship Committee consisting of a chairperson who shall be a non-executive director and such other members as may be decided by the Board. (Clause 178(5))
- The limits for political contribution by company increased from 5% as provided in the Companies Act 1956. to 7.5%. of the average net profits of the Company during the three immediately preceding financial years. (Clause 182)
- Inter-corporate Investments not to be made through more than 2 layers of Investment companies unless otherwise prescribed. The provision is subject to certain exemptions. (Clause 186)
- Restrictions on non-cash transactions by directors - No company shall enter into an arrangement by which — (a) a director of the company or its holding, subsidiary or associate company or a person connected with him acquires or is to acquire assets for consideration other than cash, from the company; or (b) the company acquires or is to acquire assets for consideration other than cash, from such director or person so connected, nless prior approval for such arrangement is

accorded by a resolution of the company in general meeting and if the director or connected person is a director of its holding company, approval under this subsection shall also be required to be obtained by passing a resolution in general meeting of the holding company.

The notice for approval of the resolution by the company or holding company in general meeting shall include the particulars of the arrangement along with the value of the assets involved in such arrangement duly calculated by a registered valuer. (Clause 192)

- Where One Person Company limited by shares or by guarantee enters into a contract with the sole member of the company who is also the director of the company, the company shall, unless the contract is in writing, ensure that the terms of the contract or offer are contained in a memorandum or are recorded in the minutes of the first meeting of the Board of Directors of the company held next after entering into contract. This provision shall not apply to contracts entered into by the company in the ordinary course of its business. (Clause 193)
- Prohibition on Forward Dealings in securities of company by Director or Key Managerial Personnel (Clause 194)
- Prohibition on Insider Trading of Securities (Clause 195). The definition of price sensitive information has also been included.

## **XV. Appointment and Remuneration of Managerial Personnel**

- Provisions relating to limits on remuneration provided in the existing Act being included in the Bill. Maximum limit of 11% (of net profits) being retained.
- For companies with no profits or inadequate profits remuneration shall be payable in accordance with new Schedule of Remuneration (Schedule V) and in case a company is not able to comply with such Schedule, approval of Central Government would be necessary.
- As per Section II of Part II of Schedule V - Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits



are inadequate, it may, without Central Government approval, pay remuneration to the managerial person not exceeding the higher of the limits under (A) and (B) given below:—

(A) Where the effective capital is	Limit of yearly remuneration payable shall not exceed (Rupees)
(i) Negative or less than 5 crores	30lakhs
(ii) 5 crores and above but less than 100 crores	42 lakhs
(iii) 100 crores and above but less than 250 crores	60 lakhs
(iv) 250 crores and above	60 lakhs plus 0.01% of the effective capital in excess of Rs. 250 crores

(B) In case of a managerial person who was not a shareholder, employee or a director of the company at any time during the two years prior to his appointment as a managerial person – 2.5% of the current relevant profit.

Provided that the above limits shall be doubled if the resolution passed by the shareholders is a special resolution

- Independent Directors not to get Stock Options but may get payment of fee and profit linked commission subject to limits specified in the Bill/rules. Central Government to prescribe amount of fees under the rules
- The premium paid on any insurance taken by a company on behalf of its managing director, whole-time director, manager, Chief Executive Officer, Chief Financial Officer or Company Secretary for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company, shall not be treated as part of the remuneration payable to any such personnel.

- Every company belonging to such class or description of companies as may be prescribed shall have Managing Director, or Chief Executive Officer or Manager and in their absence, a whole-time director and Company Secretary (Clause 203)
- The Bill provides for provision related to secretarial audit in certain prescribed companies. (Clause 204). The Secretarial Audit Compliance Report from Company Secretary to be attached to Board's Report in certain prescribed companies
- The Bill prescribes the functions of the Company Secretary. (Clause 205)

#### **XVI. Inspection, Inquiry and Investigation**

- Statutory Status to Serious Fraud Investigation Office (SFIO) proposed (Clause 211)
- The Tribunal can freeze the assets for a period not exceeding three years, on an inquiry and investigation of a company, if transfer or disposal of funds, properties or assets is likely to take place which is pre-judicial to the interest of the company. (Clause 221)
- The provisions of inspection , inquiry or investigation as applicable to Indian companies shall apply mutatis mutandis to foreign companies also. (Clause 228)

#### **XVII. Compromises, Arrangements And Amalgamations**

- Simplified Procedure for merger or amalgamation between two or more small companies or between a holding company and its wholly-owned subsidiary company or such other class or classes of companies as may be prescribed (Clause 233)
- Cross Border Mergers (Clause 234) - The provisions of Chapter XV of the Bill unless otherwise provided under any other law for the time being in

force, shall apply mutatis mutandis to schemes of mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government. The Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section.

- New “Squeeze Out” Provisions – Purchase of minority shareholding by acquirer on becoming registered holder of 90% or more of issued share capital of a company (Clause 236)

#### **XVIII. Prevention Of Oppression And Mismanagement**

- Application to National Company Law Tribunal (NCLT) for relief in cases of oppression etc. Application can also be made for relief in cases of past acts of oppression. (Clause 241)
- Class Action Suits (Clause 245) – Such specified number of member or members, depositor or depositors or any class of them, as the case may be, may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors. The order passed by the Tribunal shall be binding on the company and all its members and depositors. This Provision is not applicable to Banking Companies.

## **XIX. Registered Valuers**

- Where a valuation is required to be made in respect of any property, stocks, shares, debentures, securities or goodwill or any other assets (herein referred to as the assets) or net worth of a company or its liabilities under the provision of this Act, it shall be valued by a person having such qualifications and experience and registered as a valuer in such manner, on such terms and conditions as may be prescribed and appointed by the audit committee or in its absence by the Board of Directors of that company. (Clause 247)

## **XX. Revival and Rehabilitation of Sick Companies**

- The manner of declaring a company sick and process of its revival and rehabilitation has been completely rationalized
- The coverage of Sick Industrial Companies Act 1985 is limited to only Industrial Companies while Chapter XIX of the Bill covers revival and rehabilitation of all companies irrespective of which sector they are in.
- Any company and not only industrial company can be declared as sick company.
- Secured creditors representing 50% or more of the debt of the company and whose debt the company has failed to pay within 30 days of service notice, can apply to Tribunal for declaring the company as sick or the company who fails to repay the debt of secured creditor representing 50% or more of debt, may also apply to Tribunal for declaring itself sick. (Clause 253)
- The criteria of erosion of 50% of the networth for declaring the company as sick has been dispensed with. The sickness of company will be determined on the basis of whether the company is able to pay its debts.
  - Interim administrator can be appointed by the Tribunal for management of the company from a databank maintained by the Central Government or any institute or agency authorised by the Central Government in a manner

as may be prescribed consisting of the names of company secretaries, chartered accountants, cost accountants and such other professionals as may, by notification, be specified by the Central Government. (Clause 259)

- Powers and duties of company administrator. (Clause 260)
- Scheme of revival and rehabilitation should be prepared by the company administrator. (Clause 261)
- If the Scheme is not approved by the creditors of the company in the manner specified, then the Tribunal can order winding up of the company upon submission of report by the company administrator. (Clause 265)
- The Rehabilitation and Revival Fund as provided in the Companies (Second Amendment) Act, 2002 is to be replaced by Rehabilitation and Insolvency Fund with voluntary contributions linked to entitlements to draw money in a situation of insolvency. (Clause 269).

## **XXI. Winding up**

- For the purposes of winding up of a company by the Tribunal, the Tribunal at the time of the passing of the order of winding up, shall appoint an Official Liquidator or a liquidator from the panel maintained by the Central Government. (Clause 275)
- The provisional liquidator or the Company Liquidator, as the case may be, shall be appointed from a panel maintained by the Central Government consisting of the names of chartered accountants, advocates, company secretaries, cost accountants or firms or bodies corporate having such chartered accountants, advocates, company secretaries, cost accountants and such other professionals as may be notified by the Central Government or from a firm or a body corporate of persons having a combination of such professionals as may be prescribed and having at least ten years' experience in company matters (Clause 275)

- The jurisdiction of the Tribunal with regard to winding up. (Clause 280)
- Where the Tribunal has made a winding up order or appointed a Company Liquidator, such liquidator shall, within sixty days from the order, submit to the Tribunal, a Report containing specified particulars (Clause 281)
- The Company Liquidator shall make periodical reports to the Tribunal and in any case make a report at the end of each quarter with respect to the progress of the winding up of the company in such form and manner as may be prescribed (Clause 288)
- Apart from company liquidators, provision has been made for appointment of Official Liquidators. (Clause 359)
- Where the company to be wound up (i) has assets of book value not exceeding one crore rupees; and (ii) belongs to such class or classes of companies as may be prescribed, the Central Government may order it to be wound up by summary procedure provided under Part IV of Chapter XX.

## **XXII. Companies incorporated outside India**

- Where not less than fifty per cent. of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by one or more citizens of India or by one or more companies or bodies corporate incorporated in India, or by one or more citizens of India and one or more companies or bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with the provisions of Chapter XXII and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India. (Clause 379)
- The Central Government may make rules for the offer of Indian Depository Receipts, requirement of disclosures in prospectus or letter of

offer issued in connection with Indian Depository Receipts, the manner in which the Indian Depository Receipts should be dealt with in a depository mode and by custodian and underwriters and the manner of sale, transfer or transmission of Indian Depository Receipts, by a company incorporated or to be incorporated outside India, and whether or not it has established or will or will not establish a place of business in India. (Clause 390)

### **XXIII. Other provisions**

- The National Company Law Tribunal and Appellate Tribunal. (Chapter XXVII consisting of Clauses 407 to 434).  
As per the Supreme Court judgement on the composition and constitution of the Tribunal, modifications relating to qualification and experience etc. of the members of the Tribunal have been made. Appeals from Tribunal shall lie to National Company Law Appellate Tribunal (NCLAT)
- Special Courts to deal with offences under the Bill (Chapter XXVIII consisting of Clauses 435 to 446)
- Mediation and Conciliation Panel (Clause 442) – Mediation and Conciliation Panel proposed to be created and maintained for facilitating mediation and conciliation between parties during any proceeding under the Bill before the Central Government or Tribunal.
- Punishment for Fraud (Clause 447) - “fraud” in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;
- Dormant company (Clause 455) - Where a company is formed and registered under this Act for a future project or to hold an asset or

intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.

- Relaxation of restriction limiting the number of persons in Association or Partnerships etc. at a time to a maximum of 100 with no ceiling as to associations or partnerships formed by professionals regulated by special acts.

### **11.0 Professional Opportunities for Chartered Accountants under The Companies Bill, 2011**

Chartered Accountants have been entrusted with responsible functions under the Companies Act, 1956. They are expected to exercise due care and diligence in handling their duties. Some of the opportunities in lieu of the Companies Bill, 2011 are:

1. Choice of form of business organization – Limited Liability Partnership (LLP), One person Company, Private & Public Limited Company
2. Registration of companies
3. Advisory services
4. Drafting memorandum & articles, schemes of amalgamations
5. Appearance for compliances before Registrar, Regional Director, NCLT & NCLAT
6. A Chartered Accountant can get himself registered as a Valuer. (Valuer is a person who is appointed by the audit committee or in its absence by the Board of Directors of a company to do valuation in respect of any property, stocks, shares, debentures, securities or goodwill or net worth of a company or its assets.)
7. Chartered Accountants may be appointed by the National Company Law Tribunal as interim administrators or company administrators of a company from a panel maintained by the Central Government.



8. In the same manner Chartered Accountants may also be appointed by the National Company Law Tribunal as company liquidators of a company from a panel maintained by the Central Government.
  9. Chartered Accountants who have been in practice for at least 15 years are eligible to be appointed as technical members of the National Company Law Tribunal or the Appellate Tribunal.
  10. Advise on compounding of offences
  11. Filing of various e forms & regular annual compliance
  12. To act as independent director
  13. Internal audit
  14. Statutory audit
  15. Framing internal control framework and its compliance
  16. Assistance in Mergers and Amalgamation
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